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No. 240

In The

Supreme Court Of The United States

OCTOBER TERM

H. T. ARNOLD,

Petitioner,

v.

PANHANDLE & SANTA FE RAILWAY CO.,

Respondent.

RESPONDENT'S BRIEF IN OPPOSITION.

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INDEX

	Page
Opinions and Orders Below	2
Jurisdiction	2
Questions Presented	2
Statute Involved	3
Statement of the Case	3
Reasons for Denying the Writ:	
A. The Court of Civil Appeals has merely construed the verdict	5
B. The opinion and judgment of the Court of Civil Appeals rests on non-Federal grounds	8
C. The case is not of such importance as to justify review	8
D. The opinion, and orders of the Court below are right	9
E. Jurisdiction is not disclosed	11
Conclusion	11

AUTHORITIES

	Page
Benson v. Missouri-Kansas R. Co., 200 SW (2) 233, 332 U.S. 830, 68 S. Ct. 206, 92 L. Ed. 403	6, 9, 10
Federal Rules of Civil Procedure, Rule 49	6
Golden North Airways v. Tanana Publishing Company, 218 F. (2) 612	6
Harbin v. City of Beaumont, 146 SW (2) 297	5, 6
Hopson v. Gulf Oil Corp., 150 Tex. 1, 237 SW (2) 352	5
Lasagna v. McCarthy, 177 Pac. (2) 734, 332 U.S. 829, 68 S. Ct. 205, 92 L. Ed. 403	6, 9
Pardee v. Aldridge, 189 U. S. 429, 23 S. Ct. 514, 47 L. Ed. 883	5
Peeler v. Smith, 18 SW (2) 938, aff. 29 SW (2) 975	6
Socony Vacuum Oil Co. v. Aderhold, 150 Tex. 292, 240 SW (2) 751	5
Sproles v. Rosen, 126 Tex. 51, 84 SW (2) 1001	5, 6
U.S.C.A., Vol. 45, Sec. 51, et seq.	3
Walker v. Houston Electric Co., 155 SW (2) 973	6

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BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

TO THE HONORABLE, THE SUPREME COURT OF THE UNITED STATES:

Respondent, Panhandle and Santa Fe Railway Company, having received on July 7, 1956, copy of printed document entitled PETITION FOR CERTIORARI, in deference to the literal wording of Supreme Court Rule 24 — "respondent shall have thirty days . . . . after receipt of a petition, within which to file . . . . an opposing brief" — proceeds, within thirty days after July 7, 1956, to file this, its Brief In Opposition, making herein the best record references it can.

OPINIONS AND ORDERS BELOW

The Opinions and Orders of the Court below are correctly set forth in the Petition except as to two insignificant typographical errors: 1) page 25, "last", second word in last paragraph, should obviously be "law"; 2) page 26, "A.M.", should obviously be "A.J."

JURISDICTION

On its face the Petition does not disclose jurisdiction in this Court: 1) It confesses, page 9, that the questions Petitioner seeks to present were first presented in the Court of Civil Appeals in "his Motion for Rehearing"; 2) Since the case arose in the State Court, the Petition does not effectually comply with Supreme Court Rule 23 — 1 (b) (iii), or 23 — 1 (f).

QUESTIONS PRESENTED

1. Whether jurisdiction is disclosed by the Petition.
2. Whether a Texas State Court may construe a jury verdict in a Federal Employer Liability Act Case, consistent with the construction placed on all verdicts, by the Texas, Federal, and other State courts.
3. Whether any Federal question has been decided by the Court of Civil Appeals, or, if so, if the opinion and judgment do not adequately rest on non-Federal grounds.
4. If any Federal right or immunity has been affected, whether the case involves such "general principles", or is of such "public interest" as to warrant review.
5. Whether the opinion and judgment of the Court, or Courts, below are clearly right.

STATUTE INVOLVED

The suit against Respondent is brought under 45 U. S. C. A., Sec. 51, et seq.

STATEMENT OF THE CASE

Petitioner, as plaintiff, sued Billings Transfer Company, and Respondent, his employer, compaining that one of Billings' trucks ran over him. He charged Billings was negligent in eleven particulars. He alleged that Respondent was negligent A) in failing to furnish safe place to work; B) in failing to warn him of the presence of the truck; C) In failing to provide a flagman to protect him; D) In failing to furnish him a blue flag; E) In permitting the truck to be operated in a careless manner; F) In permitting the truck to be in the area; G) In failing to keep a proper lookout for him. (Tr. 24-30).

From these allegations and plaintiff's testimony 1) that he knew of the presence of the truck (S.F. 10); 2) that the surface on which he was injured was a "pressed gravel walk-way", "hard", "smooth", "level" (S. F. 7); and 3) that Billings' truck backed against him without giving signal (S.F. 15, 25), it is obviously plaintiff's claim that the place was "unsafe" because of the use being made thereof, and the acts and omissions which he particularized.

The trial court submitted every issue requested by plaintiff, covering all specific acts and omissions particularized, and some not alleged: Compare the charge (Tr. 55-71) with plaintiff's Amended Petition (Tr. 24-30). At plaintiff's request, and over defendant's objection that Special Issues 1, 2 and 3 were merely general issues, and that "a reasonable safe place to work" had not been defined (Tr.

42-43, Objections 4, 5 and 6) the Court also submitted therein the general issue of "unsafe place" (Tr. 75-76—Issues 1, 2 and 3). The jury absolved defendant and Billings of responsibility for every act or omission particularized in the pleading and in the issues (Tr. 75-84, — Issues 4-29A), including specific findings that defendant was not negligent in failing to warn plaintiff (Issues 4-6A); that defendant was not negligent in permitting the truck to use the area (Issues 7-9A); that defendant did not fail to keep a proper lookout for plaintiff (Issues 10-11A); that Billings' driver did not fail to keep a proper lookout for plaintiff (Issues 12-13A); that the truckdriver's failure to give warning was not negligence (Issues 14-16A); that it was not negligence to back said truck (Issues 17-18A); that the truck did not back "too close to the . . . cars on which plaintiff was working" (Issues 19-21A); that the truck did not back at negligent speed (Issues 23-25); that operating the truck without clear vision was not negligence (Issues 27-29A). In conflict with these specific findings, and without the term having been defined, the jury then made the general finding of failure to furnish safe place to work, negligence, and causation (Issues 1-3). The jury then found that plaintiff's negligence in failing to keep a proper lookout for the truck was a proximate cause of his injuries, but not the sole cause (Issues 33-34A), and diminished the damages therefor (Issue 39).

The Court of Civil Appeals, giving express recognition to the fact that the case was tried, and must be decided, in keeping with Federal decisions, has merely construed the jury's verdict, and held that the jury's specific findings above set forth, completely negatived and destroyed its general finding of unsafe place, with the legal con-

sequence that plaintiff's specifically found negligence in failing to keep a proper lookout, was the only validly found cause of his injury.

REASONS FOR DENYING THE WRIT

A. THE COURT OF CIVIL APPEALS HAS MERELY CONSTRUED THE VERDICT.

"The pleadings establish the boundary of a lawsuit", Socony Vacuum Oil Co. v. Aderhold, 150 Texas, 292, 240 S. W. (2) 751.

Giving full recognition to Federal rights, and the holdings of Federal decisions, Texas Courts, in all cases, follow "our settled rules of procedure". Hopson v. Gulf Oil Corp., 150 Texas, 1, 237 S. W. (2) 352; Socony Vacuum Oil Co. v. Aderhold, *supra.*

"The issue in response to which the general finding was made should not have been submitted", Sproles v. Rosen, 126 Tex. 51, 84 S. W. (2) 1001; "On appellant's petition, having plead special facts invoking appellee's duty to guard the hole, the additional allegation that appellee was guilty of negligence in failing to furnish Harbin a reasonably safe place to work was a mere legal conclusion, flowing from the specific facts, and not a plea of a special act of negligence. Having acquitted appellee of all specials acts of negligence, the finding of the jury that appellee was guilty of negligence in not furnishing Harbin a reasonably safe place to work was nothing more than the jury's conclusion of law, which has no support in the facts found, and therefore cannot support a judgment." Harbin v. City of Beaumont, Tex. Civ. App., 146 S. W. (2) 297, writ of error dismissed – judgment correct.

It is the very essence of the judicial review function to construe a jury verdict, and when a general jury finding is completely negatived by specific findings, the general finding must be disregarded, and the specific findings control. Federal Rules of Civil Procedure, Rule 49; Pardee v. Aldridge, 189 U. S., 429, 23 S. Ct. 514, 47 L. ed. 883; Golden North Airways v. Tanana Publishing Co., 218 F. (2) 612; Lasagna v. McCarthy, 177 Pac. (2) 734, (certiorari denied) 332 U. S. 829, 68 S. Ct. 205, 92 L. ed. 403; Benson v. Missouri-Kansas-Texas R. Co., Tex. Civ. App., 200 S. W. (2) 233 (certiorari denied), 332 U. S. 830, 68 S. Ct. 206, 92 L. ed. 403; Walker v. Houston Electric Co., Tex. Civ. App., 155 S. W. (2) 973, Writ of Error Refused; Sproles v. Rosen, *supra;* Harbin v. City of Beaumont, *supra;* Peeler v. Smith, Tex. Civ. App., 18 S. W. (2) 938, aff., 29 S. W. (2) 975.

The questions posed by Petitioner are ineptly stated, and are not the real questions involved. The question is not "whether a reasonably safe place in which to work is a proper jury question upon which judgment can be entered". If no objection is made to its generality, of course it is. But when objected to as being general, as it here was, it is not. But, the real question at issue is, can plaintiff submit his case in one general, all-inclusive issue and then submit the same concept in specific issues which make up the whole of the general issue? And, having done so, and the jury having found the place to be safe in all particulars, but without proper guidance from the Court have further found generally that the place is unsafe, will the general finding support the judgment? Cases already cited, and numerous others, answer these questions in the negative.

Petitioner's Statement contends that the area was too narrow for the truck and Petitioner. But, upon full evidence, the jury foreclosed this issue against Petitioner when it found that defendant was not negligent in letting the truck use the area (Issue 8), and that the truck was not backed "too close the railway cars on which plaintiff . . . was working" (Issue 19).

Petitioner says, page 6, that the truck was not permitted to go forward; that "it had to back out as it did." This is directly contrary to Petitioner's testimony. He stated repeatedly it had gone forward "lots of times" (S. F. 19-20, 61, 78).

Petitioner misconstrues the holding of the Court of Civil Appeals. On pages 12 and 17 he argues that the Court has held that the finding of unsafe place has "no support in the evidence". What the Court said is that the finding of unsafe place could not be a basis of liability "under the jury finding"; that the general finding "has no support in the facts found". (Petition, pages 24-25.)

Petitioner argues, in effect, that plaintiff has been subjected to a law ruling of "no evidence", and he cites a multitude of cases holding that the lower courts had erred in denying plaintiff a jury trial, which he says are "in direct conflict" with the Court's holding. Those cases are not in point here. The Court of Civil Appeals made no such holding. Plaintiff had a jury trial. The jury returned a verdict. The Court of Civil Appeals has construed that verdict, and has held that its legal effect is a verdict for Respondent, and not for Petitioner.

B. THE OPINION AND JUDGMENT OF THE COURT OF CIVIL APPEALS RESTS UPON NON-FEDERAL GROUNDS.

The judicial construction of a jury verdict, the same as the construction of contracts, is not a Federal question. It is not a decision on Federal law. It is a decision of local or general law of the forum, made in keeping with the procedure and precedent rulings of the forum. See cases cited under heading A hereof.

C. THE CASE IS NOT OF SUCH IMPORTANCE AS TO JUSTIFY REVIEW.

This case is of importance to the parties only. It was tried as arising under the Federal Employers Liability Act. The trial was to jury. Every issue tendered by plaintiff was submitted, some not even embraced in his petition. That the situation of which Petitioner complains is rare, and of infrequent occurence, is evidenced by the fact that Petitioner cites not a single case construing a jury verdict. The matter of which Petitioner complains is of Petitioner's own making in the intransigeance of his trial counsel. He induced the trial Court to submit a wholly improper issue, without defining a legal term employed therein, over Respondent's objection that the issue was improper, and that the term had not been defined, when the uniform line of decisions cited under Heading A hereof condemned the course pursued. There is no reason to suppose that the situation will arise again, when it can be so readily avoided by conforming to decisional precedent, rather than insisting upon a double submission of plaintiff's case, as was here done. In such matters as are found here, arising in the manner here shown, there is no public interest; there

is nothing of national importance; no statutory construction is involved. The case does not merit review by this Court — The Supreme Court of Texas would not review it.

D. THE OPINION, AND ORDERS OF THE COURTS BELOW ARE RIGHT.

This proposition is established by 1) the Texas Supreme Court's failure to find reversible error (Petition, page 30), and 2) the authorities cited under Heading A hereof. Respondent will review only two of said cases which are so closely in point to this case.

In Lasagna v. McCarthy, Utah Sup. 177 Pac. (2) 734, (certiorari denied), 332 U. S. 829, 68 S. Ct. 205, 92 L. ed. 403, plaintiff, a car inspector, recovered a judgment for personal injuries. On appeal he claimed defendant violated its duty to him in 1) failure to furnish a safe place to work; 2) failure to furnish a blue flag; 3) failure to furnish a switch lock; and 4) failure to enforce safety rules. In reversing, and rendering judgment for defendant, the Court first held that there was no "physical condition" in the yard that made it unsafe. Then, proceeding to answer plaintiff's contention that the yard was unsafe because of the unsafe practices specified in 2), 3) and 4) above, the Court said: "This being so, the four grounds merge into one. That is, because safety rules were not enforced or safety appliances furnished respondent, the place was thereby rendered unsafe." As shown, this Court refused to review on the merits. The situation involved there, is identical to that here involved.

In Benson v. Missouri-Kansas-Texas R. Co., Tex. Civ. App., 200 S. W. (2) 233 (writ of error refused), (Certiorari denied), 332 U. S., 830, 68 S. Ct. 206, 92 L. ed. 403, the

trial Court construed the jury's verdict, gave judgment for defendant, and the Court of Civil Appeals affirmed. The jury found that defendant was negligent "in the manner of laying and maintaining its main line and passing track"; that such negligence was not "the direct and proximate cause of the death"; and (after finding total damages of $37,030), found that the "negligence on the part of the defendant, proximately contributed to cause the death" to the extent of "60%", but it also found that Benson's negligence was a proximate cause of his death. How strikingly similar the jury findings there to the jury findings here! The Court of Civil Appeals laboriously construed the verdict as a whole, and while agreeing with plaintiff's contention that ordinarily a finding of "direct and proximate cause" was synonymous with "sole proximate cause", considering the charge and verdict as a whole, since "sole proximate cause" had been separately submitted, held that the jury's finding that defendant's negligence was not "the direct and proximate cause of death", in legal effect and meaning was only a finding that said negligence was "not a proximate cause of death"; that the general finding that defendant's negligence contributed "60%" to death was only a general finding, to be disregarded; that the finding that deceased's negligence proximately caused his death, was, in legal effect, *the sole proximate, and only legal cause* of his death. As previously indicated, this Court refused to review on the merits. How strikingly, strikingly, similar that case to this case! While correct, how much more involved and difficult the construction of jury verdict made in that case, than the construction of jury verdict made in this case!

E. JURISDICTION IS NOT DISCLOSED.

As previously stated, Respondent does not believe the Petition discloses jurisdiction.

CONCLUSION

For the foregoing reasons, the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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